Office - Supreme Court, U.S.
FILED
JUL 22 1957
JOHN T. FEY, Clerk

No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1956

CIVIL

MONSON DRAY LINE, INC., APPELLANT

vs.

MURPHY MOTOR FREIGHT LINES, INC., A MINNESOTA CORPORATION, AND WITTE TRANSPORTATION COMPANY, A MINNESOTA CORPORATION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

JURISDICTIONAL STATEMENT

F. J. O'BRIEN
321 First National Bank Bldg.
Rochester, Minnesota
Attorney for Appellant

Of Counsel:
D. D. WOZNIAK
730 Minnesota Building
Saint Paul, Minnesota

Hayward-Court Brief Printing Company, Minneapolis 15, Minnesota

INDEX

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Questions presented	3
Statement of case	4
The question is substantial	5
Conclusion	8
Appendix A, Opinion of the United States District Court, District of Minnesota, Third Division, in the instant case	9
Appendix B, Order of Interstate Commerce Commission, May 22, 1953	19
Appendix C, Order, March 21, 1955	28

AUTHORITIES

Statutes:

28 U. S. C. 1336, 1398, 2284, 2321, 2322, 2323, 2324, 2325	2
49 U. S. C. 306(b) and 305(e)	2, 3
5 U. S. C. 1009(a), et seq.	2
28 U. S. C. 1253 and 2101(b)	2

Cases:

American Trucking Assoc., Inc., v. United States, 344 U. S. 298	2
Atchison, T. & S. F. Ry. Co. v. United States, 287 U. S. 248	7
Carolina Scenic Coach Lines v. United States, 59 F. Supp. 336, (W.D.N.C.)	7
Interstate Commerce Commission v. United States, 110 F. Supp. 929, (D. Md.)	7
Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N. W. 784	7
United States v. Capitol Transit Co., 338 U. S. 286	2
United States v. Great Northern R. Co., 343 U. S. 562	2
United States v. Northern Pacific Ry. Co., 288 U. S. 490	7
United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515	27
U. S. v. McWilliams, 163 F. 2d 685	7

Regulations:

Rule 101(e) of the General Rules of Practice of the Interstate Commerce Commission	2, 4, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

CIVIL

MONSON DRAY LINE, INC., APPELLANT

vs.

MURPHY MOTOR FREIGHT LINES, INC.; A MINNESOTA CORPORATION, AND WITTE TRANSPORTATION COMPANY, A MINNESOTA CORPORATION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

JURISDICTIONAL STATEMENT

The Monson Dray Line, Inc., appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the District of Minnesota, Third Division, is reported in 148 F. Supp. 471. A copy is attached as Appendix A. The Interstate Commerce Commission's findings of fact, conclusions and Order No. MC-4483 (Sub-No. 5)

wherein the appellant was awarded the authority being questioned in these proceedings is attached as Appendix B. The Interstate Commerce Commission's order denying appellees' request of waiver of its General Rule of Practice 101(e), 49 U. S. C. A. "301 to End" is attached as Appendix C.

JURISDICTION

This suit was brought under 28 U. S. C. 1336, 1398, 2284, 2321, 2322, 2323, 2324 and 2325 and 49 U. S. C. 306(b) and 305(e) and 5 U. S. C. 1009(a), et seq., to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge District Court from which this appeal is taken was entered on February 25, 1957. Notice of appeal was filed by appellant in the United States District Court for the District of Minnesota, Third Division on April 22, 1957. The time within which appellant was to file this statement of jurisdiction was extended by that Court to and including July 21, 1957.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b), and is sustained by the following cases:

United States v. Capitol Transit Co., 338 U. S. 286; *United States v. Great Northern R. Co.*, 343 U. S. 562; *American Trucking Assoc., Inc., v. United States*, 344 U. S. 298; *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515.

STATUTE INVOLVED

Rule 101(e) of the General Rules of Practice of the Interstate Commerce Commission provides:

> Time for filing. Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a de-

> sion or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

The statutes respecting notice are 49 U. S. C. 306(b) which provides:

> "Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation require. * * *"

and 49 U. S. C. 305(e):

> "In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties."

QUESTIONS PRESENTED

1. Whether the appellant satisfied the statutory requirements and commission regulations when it gave notice of the hearing before the Commission on its application for a Certificate of Convenience and necessity.

2. Whether the appellees had notice of the appellant's application and hearing for its Certificate of Convenience and Necessity No. MC-4483(5).

3. Whether the Interstate Commerce Commission had sufficient support in the record and did not act arbitrarily

or capriciously or abuse its discretion in finding the appellees guilty of laches and refusing to waive its General Rule of Practice 101(e) when appellees petitioned to reopen the proceeding known as Monson's Docket No. MC-4483, Sub. 5.

4. Whether the appellees were guilty of laches when they delayed in appealing the Commission's decision of the three-judge United States District Court.

STATEMENT OF CASE

The Interstate Commerce Commission by order dated September 22, 1953, issued to appellant Certificate of Convenience and Necessity No. MC-4483(5) to engage in operations in interstate commerce between a junction of highways in Minnesota near St. Paul, Minnesota and Minneapolis, Minnesota (the Twin Cities), to Red Wing, Minnesota via Hagen City, Wisconsin, with an off route service point of Diamond Bluff, Wisconsin. This certificate enabled the appellant to haul from the Twin Cities to Rochester, Minnesota, and Faribault, Minnesota, since it had interstate authority between the junction point of Red Wing, Minnesota, on the one hand and Rochester and Faribault on the other hand over routes wholly within Minnesota. Appellant did not have intrastate authority between the Twin Cities and Faribault or Rochester. Appellee Witte held both interstate and intrastate authority between the Twin Cities and Rochester over routes wholly within Minnesota. Appellee Murphy held both interstate and intrastate authority between the Twin Cities and Faribault, Minnesota, over routes wholly within Minnesota.

At the time appellant filed its application it served formal notice or all parties listed by the branch office of the Interstate Commerce Commission at Minneapolis, Minnesota, as being the proper parties to serve. Appellees were not

listed and were not served with formal notice although appellant claims that appellees had actual knowledge of the application since their respective agents testified that they were aware of the application.

Appellees admittedly learned of appellant's certificate No. MC-4483(5) in November of 1953 but waited almost fourteen months until December 27, 1954, before they filed a petition asking the Interstate Commerce Commission to waive rule 101(e) and reopen the proceeding.

After the filing of briefs by all parties the Interstate Commerce Commission, on March 21, 1955, issued its order denying appellees' petition. During the fourteen month delay of appellees the appellant invested large sums of money in equipment and terminals and stood to lose 51% of its entire business built up during this period if the Interstate Commerce Commission would have waived rule 101(e).

Appellees, after waiting an additional ten months, instituted this action in the United States District Court to suspend, enjoin, annul and set aside all findings and all orders made and entered by the Interstate Commerce Commission in the proceedings No. MC-4483(5) and to remand said proceedings to the Interstate Commerce Commission for further proceedings.

The District Court held that the Interstate Commerce Commission abused its discretion and acted arbitrarily in denying appellees' application to waive rule 101(e).

THE QUESTION IS SUBSTANTIAL

The statutory provisions concerning notice in these proceedings provide that reasonable notice be afforded. Because of the multitude of applications being filed Congress wisely did not guarantee that all carriers would receive notice of each application. Pursuant to authority vested in it

the Interstate Commerce Commission adopted regulations whereby the applicant shall ascertain the names of its competitors and serve them with notice of filing the application. The appellant in the instant case went to the branch office of the Interstate Commerce Commission in Minneapolis and explained the proposed route and obtained a list of competitors to be notified. All competitors on the list were notified. Obviously there were hundreds of carriers in competition with the appellant at various points on its route other than the Wisconsin route who were not notified. There are doubtless innumerable certificates outstanding where this same procedure was followed in giving notice and which would be subject to divestment if the District Court's decision is upheld. Where the applicant has complied with the requirement of reasonableness, as the applicant has done in the instant case, the public should not be penalized by having an existing beneficial service placed in jeopardy by the attack of a competitor who is not competing over exactly the same route that is being questioned.

2. The appellees waited almost fourteen months before moving the commission to waive its rule 101(e). The final paragraph of MC-4483(5) provides:

> "AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

Appellant was under an affirmative duty to give service over this route and it did so during the fourteen month delay to the extent that 51% of its increased business for that period was attributed to this route. Appellant expended large sums on increased personnel, equipment and terminal facilities during appellees' laches.

The District Court recognized that the question of whether rule 101(e) should be waived is addressed to the discretion of the Interstate Commerce Commission. The Interstate Commerce Commission acted only after briefs relating all relevant facts were presented by the appellant and appellees. Only once in the history of administrative law has an appeal court's discretion been substituted for that of the Commission and that was in *Atchison, T. & S. F. Ry. Co. v. United States,* 287 U. S. 248 and it since has been restricted to its own facts and stands virtually alone. *United States v. Northern Pacific Ry. Co.,* 288 U. S. 490. The cases are in apparent accord that there must be a clear showing of an abuse of discretion in order to overturn the commission's decision. *United States v. Pierce Auto Lines,* 327 U. S. 515, 534-535; *Interstate Commerce Commission v. United States,* 110 F. Supp. 929, 931-932 (D. Md.); *Carolina Scenic Coach Lines v. United States,* 59 F. Supp. 336, 337-338 (W.D.N.C.) affirmed 326 U. S. 680. "Abuse of discretion" has traditionally meant abuse that is so plain that upon consideration of the facts upon which the trier of fact acted, an unprejudiced person can say that there was no justification, or excuse for the ruling made, *Seifert v. Buhl Optical Co.,* 276 Mich. 692, 268 N. W. 784, or that the action was arbitrary, fanciful, or clearly unreasonable. *U. S. v. McWilliams,* 163 F. 2d 685.

Of course it would be an easy matter for appeal courts to usurp the administrative agency's function and substitute their discretion for that of the agency's by merely making findings of fact which do not show the reasonable basis upon which the agency's decision or ruling is based. But the agency is the body that is more closely connected with these proceedings and their decisions in matters of discretion should be protected. The shipping public and the carriers cannot be benefited if legal certificates are attacked

long after they are issued and Interstate Commerce Commission rulings denying a reopening are overruled. Certainty is necessary to protect the shipping public and the appeal court's discretion should not be substituted for that of the Interstate Commerce Commission.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of importance to the appellant and the public. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted.

F. J. O'BRIEN
321 First National Bank Bldg.
Rochester, Minnesota
Attorney for Appellant

Of Counsel:
D. D. WOZNIAK
730 Minnesota Building
Saint Paul, Minnesota

APPENDIX A.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 2815

CIVIL

MURPHY MOTOR FREIGHT LINES, INC., A MINNESOTA CORPORATION, AND WITTE TRANSPORTATION COMPANY, A MINNESOTA CORPORATION

Plaintiffs

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants

AND

MONSON DRAY LINE, INC.

Intervening Defendant

Mr. Perry R. Moore and Mackall, Crounse, Moore, Helmey & Palmer, Minneapolis, Minnesota, for plaintiffs;
Mr. George E. MacKinnon, United States Attorney,
Mr. Kenneth G. Owens, Assistant United States Attorney, St. Paul, Minnesota, and
Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C., for defendants; and
Mr. F. J. O'Brien, Rochester, Minnesota, and
Mr. D. D. Wozniak, St. Paul, Minnesota,
for intervening defendant.

Before Sanborn, Circuit Judge, and Nordbye and Donovan, District Judges.

PER CURIAM.

Murphy Motor Freight Lines, Inc. (Murphy), and Witte Transportation Company (Witte) are Minnesota corporations and common carriers by motor vehicle. They brought this action to set aside: (1) a certificate of public convenience and necessity issued by the Interstate Commerce Commission (Commission) on September 22, 1953, in what the parties refer to as "Monson's Docket No. MC-4483, Sub. 5," to Monson Dray Line, Inc. (Monson), a Minnesota corporation, a common carrier by motor vehicle; and (2) an order of the Commission of March 21, 1955, entered in the same proceeding, denying a petition filed on December 27, 1954, by Murphy and Witte, requesting a waiver by the Commission of its General Rule of Practice 101(e), 49 U. S. C. A. "§301 to End," page 477, for the purpose of having the Monson proceeding reopened and set for hearing.

The certificate of the Commission, of which the plaintiffs complain, enables Monson to carry shipments originating in the Twin Cities (Minneapolis and St. Paul, Minnesota), consigned to Faribault, Minnesota, or Rochester, Minnesota, over a route from the Twin Cities to Red Wing, Minnesota, which passes through Wisconsin, and thus has the effect of transmuting what would otherwise constitute intrastate traffic—which Monson could not transport to Faribault and Rochester without authority from the Minnesota Railroad and Warehouse Commission (Minnesota Commission)—into interstate shipments, which Monson can transport between those points as interstate traffic because of authority granted by the Interstate Commerce Commission.

Monson did not, and does not, have authority from the Minnesota Commission for the intrastate transportation of commodities between the Twin Cities and Faribault or

Rochester. Murphy had, and has, general commodity regular route authority, both interstate and intrastate, between the Twin Cities and Faribault and between the Twin Cities and Red Wing over routes within Minnesota. Witte had, and has, similar authority, both interstate and intrastate, between the Twin Cities and Rochester and between the Twin Cities and Red Wing.

Before the issuance on September 22, 1953, by the Commission of the certificate to Monson, Monson could not transport any intrastate traffic between the Twin Cities and Faribault or Rochester. The issuance of the certificate to Monson put it in a position to compete directly with Murphy and Witte for such traffic by using the Wisconsin route to Red Wing and combining that with Monson's other interstate authority. The plaintiffs assert that this was done deliberately by Monson to avoid or evade regulation by the Minnesota Commission.

The plaintiffs, concededly, had no actual notice of Monson's application for the certificate of September 22, 1953. They were afforded no opportunity to be heard in opposition. The evidence indicates that the plaintiffs had no notice or knowledge of the issuance of the certificate prior to November 17, 1953, which was approximately fifty-five days after the certificate had been issued. The 30-day period provided by Rule 101(e) of the Commission's General Rules of Practice, for seeking a reopening of such a proceeding, had expired. There was then no way in which the plaintiffs could secure a reopening of the proceeding unless the Commission was willing to waive its rule. However, the plaintiffs did not promptly move for a waiver of the rule, but on December 27, 1954, filed a petition "to waive Rule 101(e) and request for leave to file a petition to set aside or revoke a certificate, reopen and set the subject matter for hearing." On March 21, 1955, by order

of the Commission, "said request for waiver of Rule 101 (e) of the General Rules of Practice" was "denied, for the reason that such action is not warranted."

When Monson filed its application for the certificate of public convenience and necessity with the Commission on October 9, 1952, Monson was a direct competitor of the plaintiffs at Red Wing, Minnesota. There is no doubt that, as interested parties, the plaintiffs were entitled to reasonable notice of the application and to an opportunity to be heard.

The applicable statutes respecting notice are Section 306 (b), Title 49 U. S. C. A., which provides:

> "Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation require. * * *"

and Section 305(e), Title 49 U. S. C. A., which provides:

> "In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties."

In addition, there was in effect a regulation of the Commission, published April 26, 1951 (49 C. F. R. §168.1(b), 16 F. R. 3587), which contained the following:

> "* * * A notice of the filing of such application, Form BMC 15 (Revised) (§7.15), must also be delivered, in person or by registered or receipted mail,

to each motor carrier and each carrier by rail or water, known to the applicant, with whose service the operations described in such application are or will be directly competitive."

The application form BMC-78 (49 C. F. R. §7.78, 16 F. R. 3587, published April 26, 1951), provided that the applicant should sign a Certificate of Service thereon, showing that

> "A notice of the filing of this application, Form BMC 15 (Revised), has been delivered, in person or by registered or receipted mail, to the following carriers by motor vehicle, rail, or water, known to the applicant, with whose service the operations described in this application are or will be directly competitive (applicant should make diligent inquiries, including, among other places, the appropriate field offices of the Commission's Bureau of Motor Carriers, to determine the name of every motor carrier, railroad, or water carrier with whose service the operations described in this application are or will be competitive)."

It is apparent that Monson failed to make diligent inquiry as to the names of carriers whose services would be directly competitive with the operations described in its application. It appears that Edward J. McMonigal, Traffic Manager for the Monson Dray Line, did visit the Commission's field office in Minneapolis and obtained from a Mr. Ganley there a list of carriers upon whom service should be made. But an examination of that list would indicate that Mr. Ganley assumed that the competitive carriers would be the few which served the particular area in Wisconsin over U. S. Highways 10 and 63 over which Monson sought to obtain rights in connecting its operations in the Twin Cities with those in southeastern Minnesota. This seems evident when the list of the competitors is examined and they are found to be the Chicago, Burlington and Quin-

cy Railroad, which serves Diamond Bluff and Hager City, Wisconsin; Funk Bros., Bay City, Wisconsin; C. W. Murphy, Hager City, Wisconsin; Wayne Steel, Maiden Rock, Wisconsin; and Glendenning Motorways, St. Paul, Minnesota. Monson knew that Murphy and Witte were in direct competition with it at Red Wing, and, moreover, knew that if its application was granted it would utilize the route through Wisconsin in order to be able to carry intrastate shipments from the Twin Cities to Rochester and Faribault. It seems apparent that Monson wholly failed to make any diligent inquiries in order to determine the name of every motor carrier with whose service the operations described in its application would be competitive. A mere inquiry from the party in charge of the Minneapolis field office in that regard did not relieve Monson from the mandate of the statute, and if the field office had been advised by Monson that under the Wisconsin route it would be able to operate in direct competition with the plaintiffs in making intrastate hauls from the Twin Cities to Rochester and Faribault, it seems inconceivable that the Commission would have limited its list to those indicated above. It is not necessary for us to determine what constitutes diligent inquiry by one who files an application with the Commission for authority to expand the applicant's operations as a common carrier. Suffice it to say that, under the undisputed facts herein, the plaintiffs were parties known to the applicant to be carriers "with whose service the operations described in" its "application would be directly competitive."

But although we are of the opinion that adequate notice was not given to the plaintiffs in compliance with the statute which required reasonable notice to all interested parties, we are not requested to stay or interfere with Monson's activities under the certificate which has been issued. Our inquiry is limited to whether the Commission, in view

of Monson's failure to give reasonable notice, and in view of the exceptional facts which were made to appear at the time the plaintiffs filed their application for waiver of Rule 101(e), abused its discretion and acted arbitrarily in failing to afford the plaintiffs a hearing. We are not unmindful that, in determining whether the Commission's rule for reopening should be waived, we must recognize that this question is one which is primarily addressed to the discretion of the Commission, and it is only in a case where there are exceptional facts that a reviewing court will interfere. However, the failure to give notice to the plaintiffs deprived the Commission of an opportunity to be advised of all the relevant facts, and it would seem that that circumstance is a persuasive factor in determining the necessity for a rehearing. The very evident purpose of the statute requiring notice is to enable the Commission to be informed as to the public need and necessity of the commodity route applied for by an applicant, and, without reasonable notice to interested parties, that phase of the inquiry may remain unexplored at the hearing. The defendants admit in their brief that if the plaintiffs had made a timely application for a waiver of Rule 101(e), they would have been able to make a persuasive showing for a waiver of the rule. But the defendants' position is that the long delay amounts to laches and therefore the plaintiffs' application to this Court for relief should be denied. Our primary problem, therefore, with respect to whether or not the Commission should have waived its rule arises from the delay that took place between November 17, 1953, when the plaintiffs learned of the issuance of the certificate to Monson, and December 27, 1954, when they filed their application for a waiver with the Commission.

As soon as the plaintiffs were informed of the issuance of the Monson certificate, they took the position that the

jurisdiction of the State Commission had been usurped or circumvented by granting to Monson the so-called Wisconsin route. The plaintiffs sought the aid of the State Commission to obtain relief. Apparently the State Commission did intercede, and it is significant that Monson promised on three different occasions between November, 1953, and June, 1954, that its operations at Rochester and Faribault in handling intrastate traffic would cease. On December 29, 1953, the President of Monson Dray Line, Inc., wrote to the Chairman of the Minnesota Railroad and Warehouse Commission in part as follows:

> "After due deliberation, I have decided to presently abandon any attempts to haul commodities from the Twin Cities to Rochester, Minnesota, by way of Hager City, Wisconsin, or any Wisconsin points. In the event I should decide at some future date to begin such operation, I will give ample notice to the Commission and to the Witte Transportation Company in order that the rights of all parties may be protected."

Apparently, however, after resuming activities, that is, transporting Twin Cities origin freight to Rochester and Faribault, and after a conference with the State Commission, Monson again on April 12, 1954, wrote as follows:

> "Relative to our letters of December 29, 1953, and March 29, 1954, to Commisioner Paul Rasmussen and pursuant to a conference with the full Commission at 2:30 p.m. on April 8, 1954, at which the undersigned, Edw. J. McMonigal, our Traffic Manager, and Thomas Walsh, our attorney, were present, we hereby notify the Commission as follows:
>
> "The Monson Dray Line, Inc., will not haul any freight (except beer) moving between points in Minnesota over our interstate route in Wisconsin, namely, between Junction of U. S. Highway 10 and U. S. Highway 61 (north of Hastings) to Red Wing, Minnesota, over U. S. Highway 10 to junction of U. S. Highway 63, thence over U. S. Highway 63 into Red Wing,

Minnesota, until further notice is given to the Commission."

Moreover, it appears that during the summer and fall of 1954, Monson had a petition before the State Commission seeking authority to haul Twin Cities origin freight to Rochester and Faribault. That petition was not dismissed until November 16, 1954. When Monson finally resumed its operations under the certificate issued by the Interstate Commerce Commission, after the discontinuances to which references have been made, Monson was aware that the plaintiffs were contesting its resumption of intrastate hauling between the Twin Cities and Rochester or Faribault. In addition, it seems clear that by its own conduct Monson contributed to the delay which ensued before the plaintiffs applied for a waiver of Rule 101(e). Since it appears that the plaintiffs were deprived of reasonable notice, as required by the Interstate Commerce Act, of Monson's application by reason of Monson's neglect to comply with the applicable law, and since it appears that Monson must have known that its proposed service would be directly competitive with that of the plaintiffs, the mere lapse of time during which the parties were apparently attempting to adjust the dispute among themselves with the aid of the Minnesota Commission, should not deprive the plaintiffs of their statutory right to be heard before the Interstate Commerce Commission on the merits of Monson's application.

After due consideration, we are of the opinion that the doctrine of laches is not applicable, in view of the unusual and exceptional circumstances which occasioned the delay of which complaint now is made.

We conclude that, in view of the exceptional facts and circumstances disclosed, the Commission abused its discretion and acted arbitrarily in denying plaintiffs' application

to waive Rule 101(e). We therefore remand the proceeding known as Monson's Docket No. MC-4483, Sub 5, to the Interstate Commerce Commission for a rehearing in which all the interested parties, including the plaintiffs, may be afforded an opportunity to be heard.

Dated this 25 day of February, 1957.

John B. Sanborn,
Judge, United States Court of Appeals, Eighth Circuit.

Gunnar H. Nordbye,
Chief Judge, United States District Court.

Dennis F. Donovan,
Judge, United States District Court.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Served May 22, 1953

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-4483 (Sub-No. 5)

MONSON DRAY LINE, INC., EXTENSION—HAGER CITY

Submitted ———— Decided ————

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, with certain exceptions, between the junction of U. S. Highway 10 and U. S. Highway 61 (north of Hastings, Minn.) and Red Wing, Minn., over specified regular routes, and return, serving Hager City, Wis., as an intermediate point, and Diamond Bluff, Wis., as an off-route point, with service at the junction of U. S. Highways 10 and 61 limited to joinder only with applicant's otherwise authorized regular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Gordon Monson for applicant.

REPORT AND ORDER

RECOMMENDED BY JOINT BOARD NO. 142, COMPOSED OF CLIFFORD C. PETERSON OF MINNESOTA AND EDWARD T. KAVENY OF WISCONSIN

No oral hearing has been held in this proceeding, and the case has been submitted on verified statements of fact. The application has been duly referred to joint board No. 142 for appropriate proceedings in accordance with provisions of the Interstate Commerce Act. No protest against the granting of the application, as amended, has been filed.

By application filed October 9, 1952, as amended February 10, 1953, Monson Dray Line, Inc., of Zumbrota,

Minn., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce as a common carrier by motor vehicle, of general commodities, except those of unusual value, and except class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between Minneapolis and St. Paul, Minn., and Red Wing, Minn., operating from Minneapolis over city streets to St. Paul, Minn., thence over U. S. Highway 10 (also U. S. Highway 61) to junction presently authorized alternate route (combined U. S. Highways 10 and 61), thence over said presently authorized alternate route (combined U. S. Highways 10 and 61 as described on page 2 of certificate No. MC-4483 (Sub-No. 3), dated November 6, 1950) to a point just north of Hastings, Minn., thence over U. S. Highway 10 to junction U. S. Highway 63 near Ellsworth, Wis., thence over U. S. Highway 63 to junction U. S. Highway 61 in Red Wing, Minn., and return over the same route, serving the intermediate point of Hager City, Wis., the off-route point of Diamond Bluff, Wis., and all intermediate and off-route points in the Minneapolis-St. Paul, Minn., commercial zone as defined by the Commission.

Applicant holds certificates authorizing operation, in interstate or foreign commerce, as a motor common carrier of general commodities, with exceptions, between various points in Minnesota, including Minneapolis, St. Paul, and Red Wing. So far as here material, applicant is authorized in its certificate No. MC-4483 (Sub-No. 3) to transport general commodities, with exceptions, over an alternate route between St. Paul and Red Wing, over U. S. Highway 61, by way of Hastings. From St. Paul to a point just north of Hastings, U. S. Highways 61 and 10 coincide.

At the above-described junction just north of Hastings, however, these highways separate, U. S. Highway 61 going south through Hastings and U. S. Highway 10 going east into Wisconsin. Applicant's existing certificate also authorizes general commodity operations between Minneapolis and Red Wing, operating from Minneapolis over Minnesota Highway 55 to junction U. S. Highway 61 and thence over U. S. Highway 61 to Red Wing.

In the instant proceeding applicant is seeking authority as previously described, and intends to operate from St. Paul over the combined segment of U. S. Highways 61 and 10 to the described junction just north of Hastings, and thence into Wisconsin over U. S. Highways 10 and 63 as described to Hager City, and thence across the Mississippi River to Red Wing. Applicant maintains a terminal at Red Wing and operates about 11 tractors, 11 semitrailers, and 5 van-type trucks. No additional equipment will be required to render the proposed service. One of the semitrailers is open top and the others are van-type equipment. A balance sheet dated December 31, 1952, shows applicant's net worth to be slightly in excess of $6,000, exclusive of capital stock valued at $40,000. During 1952, applicant operated at a net profit of approximately $350. The joint board concludes that applicant is fit and able, financially and otherwise, properly to conduct the operations for which authority is recommended herein.

The application is supported by a number of consignees located at Red Wing, a lumber company at Hager City, and the Red Wing Chamber of Commerce. The lumber company at Hager City uses motor vehicle service in the transportation of its inbound shipments originating at points outside Wisconsin. Recently a shipment of hardware originating at Milwaukee, Wis., was shipped by motor vehicle from that city and interchanged at St. Paul to applicant's

line for delivery because Hager City does not have any regular motor common carrier service. Since applicant could not deliver direct to Hager City, it transported the shipment to Red Wing and the consignee had to arrange for pickup at that point causing certain inconvenience and expense. It is inconvenient also for certain business concerns located in Red Wing not to have motor common carrier service available to Hager City and Diamond Bluff. These concerns receive commodities, some of them bulky and heavy, which originate at points outside Wisconsin for ultimate delivery to job sites and consignees at Hager City or Diamond Bluff. These Red Wing business concerns would like to make these shipments direct from their suppliers to Hager City and Diamond Bluff indicating that it would save time and expense. Red Wing has a population of about 10,635, and the Chamber of Commerce has a membership of approximately 245 business concerns and individuals. Red Wing is said to enjoy a trade territory covering points within 50 miles of that city, and the business concerns in Red Wing obtain considerable business from customers across the river in Wisconsin, including those at Hager City and Diamond Bluff. The Chamber of Commerce indicates that the proposed service would be of particular benefit to contractors, plumbers, painters, and furnace installers in that they would then have a motor common carrier service available for delivery direct to Hager City or Diamond Bluff.

In addition to the above facts, it is indicated by applicant's president that there are occasions, particularly during the springtime, when the water in the Mississippi River reaches such a high stage that the bridge on U. S. Highway 63 across the river at Red Wing is closed for a number of weeks. On these occasions consignees of freight at Hager City and Diamond Bluff, who normally receive their freight

at Red Wing, have been compelled to drive long distances in a circuitous manner via Prescott, Wis., in order to reach Red Wing.

The joint board concludes that the application should be granted partially, to the extent indicated in the findings herein. The evidence, in our opinion, establishes a need for the service proposed by applicant to the extent shown in the findings. It is apparent that adequate motor common carrier service is not now available to Hager City and Diamond Bluff and that the proposed motor vehicle service direct to those points would fill a real need for service by the shipping public, which is now inconvenienced to some extent by having to pick up shipments at Red Wing or arrange for further transportation beyond that point.

As previously indicated herein applicant already holds authority to operate over U. S. Highways 10 and 61 (combined) between St. Paul and the point where these highways separate just north of Hastings. In these circumstances, to avoid duplication, applicant will be authorized to operate between the junction of U. S. Highway 10 and U. S. Highway 61 (north of Hastings) and Red Wing, operating from the described junction point over U. S. Highway 10 to junction U. S. Highway 63 and thence over U. S. Highway 63 to Red Wing, serving Hager City as an intermediate point and Diamond Bluff as an off-route point. Service at the described junction will be limited to joinder only with applicant's otherwise authorized regular routes. Although applicant seeks authority herein to serve all points in the Minneapolis-St. Paul commercial zone, it is unnecessary to grant this since it is now serving these cities and consequently has authority to serve the commercial zones of those municipalities. *Commercial Zones and Terminal Areas*, 54 M. C. C. 21, 108.

The joint board finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between the junction of U. S. Highway 10 and U. S. Highway 61 (north of Hastings, Minn.) and Red Wing, Minn., operating from junction U. S. Highway 10 and U. S. Highway 61, over U. S. Highway 10 to junction U. S. Highway 63, and thence over U. S. Highway 63 to Red Wing, Minn., and return over the same route, serving Hager City, Wis., as an intermediate point and Diamond Bluff, Wis., as an off-route point, with service at the junction of U. S. Highway 10 and U. S. Highway 61 limited to joinder only with applicant's otherwise authorized regular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and the rules and regulations of the Commission thereunder; that an appropriate certificate should be issued, and that in all other respects the application should be denied.

By joint board No. 142.

(Signature) Clifford C. Peterson
(Signature) Edward T. Kaveny

Recommended by joint board No. 142, composed of Clifford C. Peterson of Minnesota and Edward T. Kaveny of Wisconsin.

(Signature) Clifford C. Peterson
(Signature) Edward T. Kaveny

ORDER
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

NO. MC 4483 SUB 5

MONSON DRAY LINE, INC., ZUMBROTA, MINNESOTA

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 22nd day of September, A. D. 1953.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General Commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requir-

ing special equipment, and those injurious or contaminating to other lading, over a regular route,

Between junction U. S. Highways 10 and 61 (north of Hastings, Minn.), and Red Wing, Minn., with service to and from the intermediate point of Hager City, Wis., and the off-route point of Diamond Bluff, Wis., and with service at junction U. S. Highways 10 and 61 for the purpose of joinder only with carrier's otherwise authorized regular routes:

From junction U. S. Highways 10 and 61 over U. S. Highway 10 to junction U. S. Highway 10 to junction U. S. Highway 63, and thence over U. S. Highway 63 to Red Wing, and return over the same route.

AND IT IS FURTHER ORDERED and is made a condition of this certificate that that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

George W. Laird,
Acting Secretary.

(Seal)

APPENDIX C

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 21st day of March, A. D., 1955.

No. MC-4483 (Sub-No. 5)

MONSON DRAY LINE, INC.,
EXTENSION—HAGER CITY

(Zumbrota, Minnesota)

Upon consideration of the record in the above-entitled proceedings, and of:

(1) Joint petition "to waive Rule 101(e) and request for leave to file a petition to set aside or revoke a certificate, reopen and set the subject matter for hearing," by Murphy Motor Freight Lines, Inc., and Witte Transportation Company, dated December 22, 1954;

(2) Reply of applicant, dated January 14, 1955; and good cause appearing therefore;

It is ordered, That said request for waiver of Rule 101 (e) of the General Rules of Practice be, and it is hereby, denied, for the reason that such action is not warranted.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

Office - Supreme Court, U.S.
FILED
AUG 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 307

CIVIL

MONSON DRAY LINE, INC.,

Appellant,

vs.

MURPHY MOTOR FREIGHT LINES, INC., a Minnesota Corporation, and WITTE TRANSPORTATION COMPANY, a Minnesota Corporation,

Appellees.

APPEAL BY INTERVENER MONSON DRAY LINE, INC., FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

(Defendants United States of America and Interstate Commerce Commission have not appealed.)

MOTIONS TO DISMISS OR AFFIRM

PERRY R. MOORE
1100 First National-Soo Line Bldg
Minneapolis 2, Minnesota
Attorney for Appellees

MACKALL, CROUNSE, MOORE, HELMEY & PALMER
1100 First National-Soo Line Bldg.
Minneapolis 2, Minnesota
Of Counsel

1957—Northwest Brief Printing Co., Minneapolis 15, Minn.

SUBJECT INDEX

	Page
Statement	2
Argument:	
Motion to Dismiss	3
Motion to Affirm	8

AUTHORITIES CITED

Cases:	Page
Alabama v. United States, 279 U.S. 229, 73 L.Ed. 675 (1929)	5, 7
American Trucking Assoc., Inc., v. United States, 344 U.S. 298	7
Benjamin v. Dubois, 118 U.S. 46, 30 L.Ed. 52 (1886)	3
Gospel Army v. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662 (1947)	4
Louisville & N. R. Co. v. United States, 238 U.S. 1, 35 S.Ct. 696 (1915)	5, 7
Montgomery B. & C. T. C. v. Ledbetter Erec. Co., 344 U.S. 178, 97 L.Ed. 204 (1952)	4, 5
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 97 L.Ed. 1094 (1953)	4
Radio Corp. of America v. United States, 341 U.S. 412, 95 L.Ed. 1062	8, 10
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212 (1948)	4
Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 57 L.Ed. 864 (1913)	4
Richmond v. Atwood, 52 Fed. 10 (1st Cir., 1892)	6
Taylor v. Breese, 163 Fed. 678 (4th Cir., 1908)	6
Urie v. Thompson, 337 U.S. 163, 93 L.Ed. 1282 (1949)	5
United States v. Capitol Transit Co., 338 U.S. 286	7
United States v. Great Northern R. Co., 343 U.S. 562	7

Page

United States v. Griffin, 303 U.S. 226, 82 L.Ed. 764 (1938) 6

United States v. Jones, 336 U.S. 641, 93 L.Ed. 938 (1949) 6

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 7

U. S. v. U. S. Smelting, Refining & Mining Co., 339 U.S. 186, 94 L.Ed. 750 ..... 4, 5

Virginian R. Co. v. United States, 272 U.S. 658, 71 L.Ed. 463 (1926) 7

Statutes:

28 U.S.C., Section 1253 2

28 U.S.C., Section 2101(b) 2 3, 4, 5, 6, 7

28 U.S.C., Section 2284 2

28 U.S.C., Section 2325 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.....

CIVIL

MONSON DRAY LINE, INC.,

Appellant,

vs.

MURPHY MOTOR FREIGHT LINES, INC., a Minnesota Corporation, and WITTE TRANSPORTATION COMPANY, a Minnesota Corporation,

Appellees.

APPEAL BY INTERVENER MONSON DRAY LINE, INC., FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

(Defendants United States of America and Interstate Commerce Commission have not appealed.)

MOTIONS TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the order and decree of the District Court be dismissed on the ground that the appeal has not been taken within the time allowed by statute, and, in the alternative, move that the order and decree of the District Court be affirmed on

the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the order and decree entered February 25, 1957, by a District Court of three judges especially constituted pursuant to 28 *U.S.C.*, Sections 2284 and 2325, which order and decree remanded the proceedings to the Interstate Commerce Commission for rehearing, in which rehearing all interested parties, including appellees, may have opportunity to be heard. The District Court held that no notice or opportunity to be heard was afforded appellees.

Notice of appeal to this Court was filed by appellant on April 22, 1957, an interval of 56 days since the coming down of the District Court decision.[1] Appellant claims that this Court has jurisdiction to review this decision by direct appeal pursuant to 28 *U.S.C.*, Sections 1253 and 2101(b) (Jurisdictional Statement, page 2).

It is appellees' position that under said statutes appellant's notice of appeal was not timely. For this reason, the Supreme Court of the United States should dismiss the appeal.

---

[1]Time for filing Appellant's Jurisdictional Statement was extended to July 21, 1957.

ARGUMENT

MOTION TO DISMISS

28 *U.S.C.*, Section 2101(b), provides:

> "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

Appellant's notice of appeal is not timely since it was not given thirty days from February 25, 1957, the date of the District Court's decree. The record is clear that notice of appeal to this Court was given by appellant on April 22, 1957, fifty-six days after the date of the decree (Jurisdictional Statement, page 2). If the order and decree was interlocutory, the notice of appeal should have been filed on March 27, 1957.

The District Court's order is not "final" within Section 28 *U.S.C.* 2101(b). The order is interlocutory. What is a "final" order for review or appeal purposes to this Court has been the subject of this Court's decisions in many cases, including Interstate Commerce Commission matters.

This Court has traditionally held that "final" for purposes of appeal under the various statutes means an order, judgment or decree that ends the litigation by fully determining the rights of the parties on the merits so that nothing remains to be done but the ministerial acts of entering the judgment directed by the Court. It is and has been the policy of this Court to avoid piecemeal appeals. In *Benjamin v. Dubois*, 118 U.S. 46, 30 L.Ed. 52 (1886), this Court said:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals or writs of error, must terminate the litigation between the parties on the merits

of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree which had been rendered."

See also:

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 97 L.Ed. 1094 (1953);

Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 57 L.Ed. 864 (1913);

Gospel Army v. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662 (1947);

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212 (1948).

28 *U.S.C.*, §2101(b), embodies the above definition of "final." As applied to appeals from the orders of a three-judge court, "final" means that the appealed order or decree completely determined the entire controversy between appellant and appellee upon the merits. Permanent injunctions are considered "final." See *Montgomery B. & C. T. C. v. Ledbetter Exec. Co.*, 344 U.S. 178, 97 L.Ed. 204 (1952); *U. S. v. U. S. Smelting, Refining & Mining Co.*, 339 U.S. 186, 94 L.Ed. 750.

In the instant case the entire proceeding was remanded to the Commission for rehearing.[2] In other words, the merits of the actual transportation controversy between appellant and appellees have not been heard or decided by either the three-judge court or the Commission. The lower court's order remanded the matter to the Commission so that the merits of the controversy might be heard there. Such an order cannot be "final" under either statutory or case law.

---

[2]This matter was handled by the Commission on a "no hearing" procedure. No hearing was had. See Appendix B, page 20 of Appellant's Jurisdictional Statement under "Report and Order" of Joint Board No. 142, reciting "no oral hearing has been held in this proceeding, etc."

A temporary injunction is merely an interlocutory order under §2101(b) and not a final order within the purview of that Section. *United States v. United States Smelting, Refining & Mining Company*, supra; *Louisville & N. R. Co. v. United States*, 238 U.S. 1, 35 S.Ct. 696 (1915); *Alabama v. United States*, 279 U.S. 229, 73 L.Ed. 675 (1929). See also *Montgomery B. & C. T. C. v. Ledbetter Erec. Co.*, supra; *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282 (1949).

In *United States v. U. S. Smelting, Refining & Mining Company*, supra, the District Court issued a temporary injunction enjoining the Interstate Commerce Commission from requiring its order to be carried into force and effect and remanded the proceedings to the Commission for rehearing. The Commission, after the rehearing, issued the same order and the District Court again enjoined the order. On appeal, to the United States Supreme Court, it was argued that the first District Court decision became law of the case as to the sufficiency of the evidence to sustain the Commission's order. The Supreme Court held that this was not the effect of the first District Court decision, saying:

> "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739; Insurance Group Committee v. Denver & R. G. W. R. Co., 329 U.S. 607, 612, 91 L. Ed. 547, 550, 67 S. Ct. 583. It is not applicable here because when the case was first remanded, nothing was *finally* decided. The whole proceeding thereafter was in fieri. *The Commission had a right on reconsideration to make a new record.* Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 374, 375, 83 L. Ed. 221, 230, 231, 59 S. Ct. 301. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in

order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable[28 USCA §1253, FCA Title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. * * *" (Our emphasis.) (339 U.S. 186, 198.)

Likewise, in the instant case, the "whole proceeding" is in fieri. The Commission, under the District Court's remand, will make a new record.

It is the position of the appellees that the foregoing authorities are controlling. The instant order was interlocutory and not final, and should have been appealed within thirty days.

A decree of the District Court remanding the case for rehearing is merely interlocutory. The District Court here did not prohibit appellant from operating as a carrier under the questioned certificate pending the rehearing. District Court decision 148 F. Supp. 471 at 475. The District Court's order in this case is appealable (within 30 days) as an interlocutory order in the sense that an interlocutory order is any intermediate order not constituting a final determination on the merits. See *Taylor v. Breese*, 163 Fed. 678, 684 (4th Cir., 1908); *Richmond v. Atwood*, 52 Fed. 10, 20 (1st Cir., 1892).

The Congressional purpose in departing from its traditional avoidance of piecemeal appeals to allow review of interlocutory orders under 28 *U.S.C.*, §2101(b), is the public interest in the speedy determination of the issues involved (within thirty days). Congress thus sought to eliminate the danger of interruption of service to the public pending the appeal. *United States v. Jones*, 336 U.S. 641, 93 L.Ed. 938 (1949); *United States v. Griffin*, 303 U.S. 226, 82 L.Ed. 764

(1938); *Louisville & N. R. Co. v. United States*, supra; *Alabama v. United States*, supra; *Virginian R. Co. v. United States*, 272 U.S. 658, 71 L.Ed. 463 (1926). No such danger of interrupted service exists in the instant case because appellant is permitted to continue operation during the rehearing.

United States v. Capitol Transit Co., 338 U.S. 286; *United States v. Great Northern R. Co.*, 343 U.S. 562; *American Trucking Assoc., Inc., v. United States*, 344 U.S. 298; *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, cited by appellant (Jurisdictional Statement, page 2) are not in point since the Court there made no fact determinations as to whether or not the appeal was properly taken or to be taken within the sixty or thirty day provision of Section 2101(b).

This Court's traditional rule against piecemeal litigation must prevail. The District Court, by its order, has not effected a *final* determination of the merits of the entire controversy. This Court should not be burdened with the issues here raised until the Commission, upon rehearing, has had an opportunity to consider the transportation controversy upon its merits. Until such rehearing, no one can know whether or not it will be necessary for this Court to hear or determine the issues here raised.

This appeal, not taken within thirty days after the lower court's decision, is not timely and should be dismissed.

MOTION TO AFFIRM

The questions presented by appellant (Jurisdictional Statement, pages 3 and 4) all involve pure questions of fact. This Court is being asked by appellant to review factual matters passed upon by the three-judge District Court after trial.

In *Radio Corp. of America v. United States*, 341 U.S. 412, 95 L.Ed. 1062, this Court held:

> "For as we have pointed out recently, in considering the question of sufficiency of evidence to support in administrative order, this Court must and does rely largely on a first reviewing court's conclusions. Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474."

We consider questions Nos. 1 and 2 (Jurisdictional Statement, page 3) together for the reason that they both revolve about the single point of notice.

Question No. 1 states that appellant gave notice of hearing before the Interstate Commerce Commission in its application for a certificate. Please note that the appellant does not state *to whom* the notice was given.

Question No. 2 states that appellees had notice of appellant's application and hearing for its certificate.

Each of these questions is answered in the District Court decision, 148 F. Supp. 471 at 473. The Court found as a fact:

> "The plaintiffs, concededly, had no actual notice of Monson's application for the certificate of September 22, 1953. They were afforded no opportunity to be heard in opposition."

On page 474 of the decision the District Court found as a fact that appellant listed and gave notice to certain carriers but failed to notify these appellees whom it knew to have been in direct competition with it at Red Wing, Minnesota, and other points, for many years. The District Court further found that appellant had also failed to make diligent inquiry

to ascertain those carriers with whom the new service would be directly competitive. Appellees, being directly competitive, had no notice whatsoever. In this state of affairs the Commission could and did invoke its "no hearing" procedure. Appellees have always contended that appellant Monson deliberately failed to list or notify appellees with the intended result that the latter could not possibly have known of the pendency of the application, enter protest thereto and demand a hearing.

The complete answer to questions 1 and 2, found as a fact by the District Court, is that appellant gave no notice to appellees and appellees neither received nor had notice of the pendency and consideration of appellant's application.

Questions Nos. 3 and 4 (Jurisdictional Statement, pp. 3 and 4.) Question No. 3 appears to question the District Court's finding that the Interstate Commerce Commission abused its discretion in refusing to waive its Rule 101(e) allowing the reopening of the case. As a fact determination, upon all of the evidence, the District Court found:

> "We conclude that, in view of the exceptional facts and circumstances disclosed, the Commission abused its discretion and acted arbitrarily in denying plaintiffs' application to waive Rule 101(e)." (148 F. Supp. 471, 476.)

The entire matter of laches was before the District Court and testimony taken thereon. It is elementary that laches is a pure matter of fact concerning unreasonable delay. After extensive discussion of the material facts, the District Court concluded:

> "After due consideration, we are of the opinion that the doctrine of laches is not applicable, in view of the unusual and exceptional circumstances which occasioned the delay of which complaint now is made." (148 F. Supp. 471, 476.)

The District Court further said:

> "In addition, it seems clear that by its own conduct Monson (appellant) contributed to the delay which ensued before the plaintiffs (appellees) applied for a waiver of Rule 101(e)." (at page 476.)

The Court's discussion of the evidence preceding the above quotations unquestionably establishes appellant's contribution to the delay and its knowledge that its operations under the questioned certificate were at all times under attack by appellees.

In question No. 3 it is said that the Commission found appellees guilty of laches. This is not true. The Interstate Commerce Commission neither considered nor decided any question of laches of appellees. See Appendix C, "Order" (Jurisdictional Statement, page 28). This Order is the only determination made by the Interstate Commerce Commission in this case after the issuance of the certificate on September 22, 1953. It denied appellees' petition for reopening with the sole statement "because such action is not warranted." The Commission did not find appellees guilty of laches—nor did the District Court.

Following *Radio Corp. of America v. United States*, supra, the questions presented by appellant are fact questions and this Court relies upon the District Court's conclusions respecting the same. The questions presented are not substantial. The motion to affirm should be granted.

In conclusion, we respectfully submit that either the motion to dismiss or the motion to affirm should be granted.

PERRY R. MOORE
1100 First National-Soo Line Bldg.
Minneapolis 2, Minnesota
Attorney for Appellees

MACKALL, CROUNSE, MOORE, HELMEY & PALMER
1100 First National-Soo Line Bldg.
Minneapolis 2, Minnesota
Of Counsel